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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903.

No. ~~190~~ 155.

DAVID J. HODGES, ELLA M. PARKER, GERTRUDE M. HODGES, AND WILLIE E. HODGES, HEIRS-AT-LAW OF JAMES L. HODGES, APPELLANTS,

vs.

WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD, AND MARY L. GRIFFITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED NOVEMBER 7, 1902.

(18,727.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 499.

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vs.

WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD, AND MARY L. GRIFFITH.

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a UNITED STATES OF AMERICA, *ss:*

United States Supreme Court.

To William C. Colcord, Henry S. Colcord, Charles F. Colcord, and Mary L. Griffith, Greeting:

You are hereby cited and admonished to be and appear at and before the United States Supreme Court at Washington city, D. C., in thirty days next, after the service of this citation to answer an appeal taken and filed in the clerk's office of the United States Supreme Court from the supreme court of the Territory of Oklahoma, wherein David J. Hodges, Ella M. Parker, Gertrude M. Hodges and Willie E. Hodges, heirs-at-law of the appellant, James L. Hodges, were plaintiffs in error, and you were defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error mentioned, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma, this 30th day of October, in the year of our Lord one thousand nine hundred and two, and the Independence of the United States of America one hundred twenty-sixth.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

Attest: BENJ. F. HEGLER,
Clerk Sup. Ct.

The service hereof accepted this the 1st day of November, 1902.
SHARTEL, KEATON & WELLS,
Attorney for Appellee.

[Endorsed:] No. 1193 James L. Hodges *vs.* William C. Colcord *et al.* Citation. Filed Nov. 3 1902 Benj. F. Hegler, clerk supreme court. By —— ——, deputy. Ent.

1 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error, *vs.* WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. Colcord, and Mary L. Griffith, Defendants in Error.	Petition in Error.

The said James L. Hodges, plaintiff in error, complains of said defendants in error in that the said defendants in error at the September term of the district court of Oklahoma county, Territory of Oklahoma recovered a judgment by the consideration of said court

against the said James L. Hodges in a certain action then pending in said court wherein the said James L. Hodges was plaintiff and the said William C. Colcord, Henry S. Colcord, C. F. Colcord and Mary L. Griffith were defendants. The original case-made, duly certified and attested is hereto attached marked "Exhibit A" and made a part of this petition in error, and the said James L. Hodges avers that there is error in said record and proceedings in this, to wit:

1st. The court erred in sustaining the demurrer to the petition.

2nd. The court erred in dismissing plaintiff's petition and action.

Wherefore the plaintiff in error prays, that said judgment so rendered may be reversed, set aside and held for naught, and that the plaintiff in error be restored to all rights he has lost by the rendition of such judgment and for such further relief as to the court may seem just.

JAMES L. HODGES,
Plaintiff in Error,
By J. S. JENKINS, *Attorney.*

Filed: Jan. 24, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

2 JAN. 22, 1902.

I hereby accept service of within petition in error and waive issuance and service of summons in error on behalf of defendants in error, and enter an appearance.

J. R. KEATON,
Att'y for Def'ts in Error.

Filed: Jan. 24, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

3 TERRITORY OF OKLAHOMA, } *ss:*
Oklahoma County, }

In the District Court in and for the County and Territory Aforesaid.

JAMES L. HODGES, Plaintiff,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. COLCORD, and Mary L. Griffith, Defendants. } Case-made.

Be it remembered, to wit, on the 1st day of June, 1901, the plaintiff, James L. Hodges, commenced his action against the defendants by filing in the district court of Oklahoma county, of that date, his petition, which is in words and figures as follows to wit:

4 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court in and for Oklahoma County, Territory Aforesaid.

JAMES L. HODGES, Plaintiff,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. COLCORD, and Mary L. Griffith, Defendants. } Petition.

The plaintiff complains of the defendants and for the cause of action herein alleges and says that he is the equitable owner of the following-described tract of land situated in Oklahoma county and Territory aforesaid, to wit: Lots 2, 3, 12, 13, 14, 15, and 18 of section 5, township 11 N. range 3 W., the same being the N. E. ¼ section 5, township 11 N., range 3 west of the Indian meridian, and he is entitled to the immediate possession of the same, and that defendants unlawfully keep him out of possession.

Plaintiff says that he is a citizen of the United States, and was a citizen of the United States at and long prior to the 22nd day of July 1889, and at all of the dates above named, he was legally qualified to make a homestead entry of said land under the laws of the United States; that in pursuance of said rights he entered and settled upon the land above described with the intent to acquire title thereto under the homestead laws of the United States, on the 22nd day of July 1889, and immediately made permanent and lasting improvements on the same as required by law to entitle him to make a homestead entry on said land; plaintiff alleges that he never entered upon or occupied any portion of the lands of the United States opened to settlement on the 22nd day of April, 1889, prior to noon of that day; that plaintiff resided on said land until the — day of ——, 189– when he was ejected by William R. Colcord, the father of the defendants. Plaintiff alleges that said William R. Colcord died on or about the 1st day of January, 1901, leaving the defendants his sole heirs.

5 Plaintiff alleges that at the time he entered upon said land, and made settlement thereon, one John Gayman had entered upon and occupied said land, that on the 25th day of April, 1889, the said John Gayman obtained a pretended homestead entry on said land, that said Gayman was disqualified from ever entering or obtaining any right or title to said land, by reason of his entering upon and occupying a portion of the Oklahoma country declared open to settlement by the President's proclamation of March 3rd, 1889, prior to 12 o'clock noon April 22, 1889, as shown by a copy of the decision of the Land Department, recorded in vol. 24, page — of the United States Land Decisions, hereto attached, marked "Exhibit A" and made a part of this petition.

In the decision above referred to the honorable Secretary of the Interior finds as facts that James L. Hodges has resided on said land since July 22d, 1889; that Runyan has resided on said land since May 13th, 1890, and William R. Colcord since 1893.

Said William R. Colcord filed his contest against the said John Gayman on the 23rd day of July, 1889, on the ground of disqualification, and the plaintiff James L. Hodges filed his contest against said John Gayman August 23rd, 1889, on the ground of prior settlement, as shown by the decision of the Hon. Secretary of the Interior dated December 1st, 1894, hereto attached marked "Exhibit B," and made a part hereof; that on the facts above stated, and the further fact found in the above decision, that John Gayman filed his relinquishment because of the said contest of the William R. Colcord, and on other facts therein found.

The honorable Secretary found as questions of law, that the said filing of the said John Gayman, as above stated, segregated the land in controversy from the public domain, and that the plaintiff acquired no rights by reason of his said settlement made on said land on the 22nd day of July, 1889, because the said settlement was subsequent to the homestead entry of said Gayman, and the hon-
6 orable Secretary further found as a presumption of law that said Gayman relinquished his said filing on said land April 12th, 1893, on account of the contest of said William R. Colcord as is shown by "Exhibit A" hereto attached as above stated.

The plaintiff alleges that the honorable Secretary of the Interior and officers of the Land Department of the United States, have misconstrued the law applicable to the facts established before said department, and thus have denied plaintiff rights which, upon a correct construction of the law, would have been conceded to him, namely, a preference right to file a homestead entry on said land, and on final proof to receive a patent to said land.

Plaintiff further states that he settled on said land in good faith, made permanent improvements on the same, and resided on said land for more than five years continuously after his settlement, as above stated. Plaintiff further states that in consequence of erroneous rulings of the officers of the Land Department, upon the law applicable to the facts found, his rights were refused him.

Plaintiff alleges that the Land Department should have found the law applicable to the facts, to be that the homestead entry of the said John Gayman was absolutely void, and that he acquired no rights by reason thereof, and that the same did not segregate said land from the public domain. James L. Hodges being the first legal settler on said land, had a preference right to file on said land; that John Gayman's said homestead entry being void, W. R. Colcord could gain no preference right to file a homestead entry on said land, because of his contest. That Gayman's relinquishment shows on its face, that it was made because of the decision in the Smith-Townsend case, and that the law could not presume that it was made because of Colcord's contest in the face of testimony to the contrary.

Plaintiff here offers to pay into court, for the benefit of the defendants, all the money that they have expended in paying the necessary fees in the land office, in obtaining a homestead filing, and
patent to said land, which plaintiff believes to be thirty-five
7 dollars, and tenders that amount.

The plaintiff alleges that he is the equitable owner of said

land and entitled to the possession of the same, and that defendants hold the naked legal title to said land, which they obtained by a misconstruction of the law, by the officers of said department; but for the misconstruction of the law as above alleged, the patent to said land would have been issued to plaintiff, and for no other reason. The plaintiff alleges that the value of the land in controversy is ten thousand dollars.

Plaintiff alleges that by reason of the misconstruction of the law applicable to the facts found in the Land Department, the patent to said land was issued to said William R. Colcord by the United States on the 13th day of June, 1899, vesting in him the naked legal title; and for no other reason. That upon the death of the said William R. Colcord, as aforesaid, the naked legal title descended to the defendants, and they are now setting up claim to said land as the sole heirs of said William R. Colcord.

Wherefore, the plaintiff prays that the defendants be cited to answer this petition, and that on a final hearing the defendants be decreed to be trustees for plaintiff, and that a resulting trust be declared in favor of the plaintiff and that the defendants be decreed to convey the legal title to said land to this plaintiff, and for all equitable relief to which he may be entitled, and for costs of suit.

(Signed) J. S. JENKINS,
Attorney for Plaintiff.

8 "EXHIBIT A."

Contest—Preference Right of Entry.

HODGES ET AL.
v.
COLCORD.

The preferred right of a successful contestant is not defeated or impaired by adverse settlement claims acquired subsequent to the entry under attack.

The right of a successful contestant accorded by section 2, act of May 14, 1880, is not dependent upon the truth of the charge as laid, if the cancellation of the entry is the result of a contest prosecuted in good faith.

Secretary Francis to the Commissioner of the General Land Office,
February 27, 1897.

(I. H. L.) (R. H. W.)

I have considered the appeals of James L. Hodges and William C. Runyon from your office decision of October 3, 1896, (on review) dismissing their contests and allowing the entry of Colcord to remain intact. This case involves lots 2, 3, 12, 13, 14, 15, and 18 of sec. 5, T. 11 N. R. 3 W. Oklahoma district, O. T.

Most of the facts as they appear in the record have been heretofore stated in departmental decisions of December 1, 1894, and April 12, 1895, in the case of Simpson and Colcord *v.* John Gayman, and

are fully set forth in your decision of October 3, 1896, from which the present appeals are taken, so that only such portions as are material to the pending issues need be here repeated.

Upon a hearing as to the land in question between Colcord and Gayman upon the charge of disqualification by reason of Gayman having entered the Territory during the prohibited period,—in which the application of Hodges to intervene was denied—the local office decided in favor of Gayman, and Colcord appealed.

On March 21, 1893, your office held that while Gayman was in the Territory at the time of opening—working for the A. T. & S. F. R. R. Co. on its right of way, he gained no advantage therefrom—
9 and affirmed *the decision below denying the application* of Hodges and dismissing the application of Colcord.

This decision came before the department for consideration upon the appeal of Colcord, the motion for review of Hodges (which was not acted on by your office) and a third contest filed by Runyon on April 13, 1893, alleging prior settlement and the disqualification of Colcord. Hodges also filed a supplementary affidavit of contest making the same charges.

While the case was pending before the Secretary, to wit, on April 12, 1893, Gayman filed his relinquishment of the tract, and Colcord made homestead entry No. 6850 of said land.

On December 1, 1894, the department having in view the rights of all parties, held that "upon the cancellation of Gayman's entry by his voluntary relinquishment, all contests pending against it necessarily abated. There remained nothing for the department to do, and the case was closed," thus denying Hodge's motion for review, "but without prejudice to any rights which Hodges may lawfully assert and maintain against the present entryman." The papers in the case of Runyon were returned for appropriate action.

Upon this decision, your office, on January 5, 1895, directed a hearing on the charges of Hodges and Runyon against Colcord.

Before said hearing was had, however, a motion for review of the departmental decision of December 1, 1894, was filed by Colcord, insisting that the department erred in not awarding him the preference right of entry by reason of the statement made in the relinquishment of Gayman.

Although said motion for review was denied, the department in its decision thereon of April 12, 1895, said: Gayman's relinquishment written on the back of his duplicate receipt, is in these words and figures following:

"I hereby relinquish all my right to and interest in and to the Government of the United States, and ask that my entry be cancelled of record. This relinquishment is made for the reason that my entry is voidable for the reason that I was in the Okla-
10 homa country at noon of April 22, 1889, and so held by the decision of the Supreme Court of the United States in the case of Smith *v.* Townsend.

JOHN GAYMON.

Subscribed to and acknowledged before me this 12th day of April, 1893.

D. D. LEACH, *Register*."

It is evident by this that the relinquishment of Gaymon was induced by the contest of Colcord, and the right of a successful contestant is superior to the right of any one who has not a right superior to that of the entryman whose entry was in contest. But as a hearing has been ordered upon the application of Hodges to contest Colcord's entry, no judgment will be rendered in this case in advance of such hearing. The rights of the respective parties can then be determined.

At the hearing had in the case of Hodges and Runyon against Colcord on September 20, 1895, Colcord moved to dismiss said contests, for the reason that neither of said plaintiffs alleged sufficient facts to show a superior right to that of Gaymon, the former entryman.

The evidence introduced by Hodges and Runyon showed that Hodges had resided on said land since July 22, 1889, Runyon since May 13, 1890, and Colcord since 1893, and that Colcord had paid Gaymon $650 for his relinquishment, but no evidence was introduced to show the disqualification of Colcord.

Colcord introduced no evidence but elected to stand upon his said motion to dismiss, and upon "the record affecting this tract of land."

On October 25, 1895, the local office rendered a decision recommending the dismissal of said contests, basing its action upon the opinion expressed by the department, relative to said relinquishment, and the right of a successful contestant, in its decision of April 12, 1895, (*supra*).

Upon the appeals of Hodges and Runyon your office, on April 29, reversed said local office decision and denied to Colcord the preference right to make entry of the land, holding that said
11 departmental decision of April 12, was not *res judicata* upon this point, and that whether Colcord acquired any right to said land by virtue of his contest depended upon whether the charge of disqualification against Gaymon is true. In its decision upon Colcord's motion for review (October 3, 1896) your office used this language: It is apparent that the decision of this office now sought to be reviewed, misinterpreted the decision of the Secretary, which clearly held that Gayman's relinquishment was the result of Colcord's contest, and that his right was superior to the right of any one whose settlement was not made prior to the entry of Gaymon. But independently of said decision such should have been the ruling of this office. The record shows as well as the relinquishment of Gaymon, that he was in the Territory at the hour of the opening and therefore under the decision of the Supreme Court of the United States in the case of Smith *v.* Townsend he was clearly disqualified. It was unnecessary to introduce evidence upon this point. As Hodge and Runyon failed to show any settlement upon the tract in controversy prior to the entry of Gaymon, they could not, by a settlement

made thereafter, and while the land was covered by said entry, and subject to Colcord's contest, gain any rights by their settlement. Hence the decision of the local office dismissing the contests of Runyon and Hodges was correct, and should have been affirmed.

Your office therefore, granted the motion for review, dismissed the contests, and allowed the entry of Colcord to remain intact.

The thirty-four specifications of error, in which the judgment here complained of is assailed by the attorney for Hodges, may be generalized so as to bring the material issues in the case within the scope of these two questions:

1. Did your office err in reviewing and setting aside its decision of the 29th of April, 1896?

2. Was there any circumstance connected with the relinquishment of Gaymon, which adversely affected Colcord's right to enter the land; either as the first applicant therefor after it became subject to entry, or, as a successful contestant in the exercise of his preference right?

12 It appears to me that the claims of Hodges and Runyon rest upon no other basis than that of settlements upon land, which, at the time, was covered by the entry of Gaymon. It had been segregated from the public domain by proper official action. No one could acquire any present right to it while in this condition. A settlement upon it, with a view to the initiation of an adverse claim—if not amounting to a trespass under the doctrine of Atherton *v.* Fowler (96 U. S. 513) is certainly without any legal status (Maggie Laird, 13 L. D. 502).

There is a line of cases to which attention is called in the argument of Hodges' attorney, in apparent conflict with this doctrine, which holds that a settler on land covered by the entry of another acquires a legal status as against the Government the instant such entry is relinquished, and the right thus acquired is not defeated by the entry of a third party immediately following such relinquishment. (McGowan *v.* McCann, 15 L. D. 542; Fosgate *v.* Bell, 14 L. D., 459; Poole *v.* McLoughney, 11 L. D., 197).

In all of these cases—the settler being upon the land at the moment it became a part of the public domain and subject to entry—his right of priority was recognized as superior to that of a third party whose claim rested upon an entry subsequent to the settlement. The relinquishment had no other affect than to relieve the land from incumbrance and open up the other questions upon which the decisions turned. But in the case at bar the question is whether Gaymon's relinquishment was the result of Colcord's contest?

If this be the fact Colcord had a preference right of entry which nothing could defeat except his own disqualification, or a right superior to that of Gaymon, the original entryman.

It is unnecessary to pass upon the conflicting interpretations of the departmental decision of April 12, 1895, as given in your office decisions of April 29, 1896, and October 3, 1896, respectively, further than to hold that the judgment of the department in said decision was suspended to await the issue of the hearing which had

13 been ordered upon the application of Hodges to contest Colcord's entry. Said decision however, did express a very de-

ided opinion "that the relinquishment of Gaymon was induced by he contest of Colcord" and, also that "the right of a successful contestant is superior to the right of any one who has not a right superior to that of the entryman whose entry was in contest."

This language—in view of the expressed purpose to render no inal judgment in this case—must be regarded as dicta and having o other effect than a preliminary intimation to the contestants that nless a right superior to Gaymon's was established at the hearing, he preference right of Colcord would not be effected.

As neither Hodges nor Runyon alleged actual settlement prior o Gayman's entry, and as their contests were subsequent in date of ling to the contest of Colcord, there was no error in rejecting Hodges' application to intervene in the latter.

The only issue was as to Gayman's disqualification, by reason of aving entered the Territory during the prohibited period.

Upon that issue, Simpson, who had filed the first contest, having bandoned it, Colcord, as next in order, had the right of way as gainst Hodges and Runyon. No rule is better settled than that ontests are entitled to precedence in the order of their filing at the ocal office.

The record shows that Colcord was diligent in the prosecution of is contest and that it was pending on appeal before the honorable ecretary, at the time Gayman's relinquishment was filed.

The question of Gayman's disqualification by reason of his presnce in the Territory during the prohibited period has not been assed upon by the depa tment, and it is unnecessary to pass upon now for the reason that it ceased to be an issue when he relinuished his entry.

Section 2 of the act of May 14, 1880, declares that:

In all cases where any person has contested, paid the land office ees and procured the cancellation of any pre-emption, homestead r timber-culture entry he * * * shall be allowed thirty days * * * to enter said lands.

There is nothing in the language here used which makes the preference right of the contestant depend upon the truth f the charge of disqualification of the entryman.

If the cancellation of the entry—whether by the relinquishment f the entryman or the judgment of the Land Department—was ie result of the contest, the preference right of entry inures to the ontestant by operation of law.

The authorities agree that a relinquishment filed during the endency of a contest is presumptively the result of the contest, Webb *v.* Loughrey *et al.*, 9 L. D. 440, and cases therein cited) and I nd nothing in the record to overcome this presumption in the case bar.

It is contended that it was the $650 paid by Colcord which moved aymon to make his relinquishment, and that Gaymon's statement ndorsed on his duplicate receipt) that:

This relinquishment is made for the reason that my entry is voidble, for the reason that I was in the Oklahoma country at noon of pril 22, 1889, and so held by the decision of the Supreme Court of

the United States, in the case of Smith *v.* Townsend is untruthful. The facts and circumstances of the case lead me to a different conclusion.

Gaymon had resisted Colcord's contest at the hearing before the local office, and again, when it came before your office on Colcord's appeal, and still again, when it came on further appeal before the department. In fact, Gaymon did not relax his hold upon his entry until the Supreme Court rendered its decision in the case of Smith *v.* Townsend (149 U. S. 490) a decision from the court of last resort, upon a state of facts, similar in nearly every respect, to the facts in his own case.

This decision was upon the 3rd of April, 1893, and Gaymon's relinquishment was ten days thereafter, to wit, on April 13, 1893. It would be contrary to every sound principle of deduction to conclude that Gaymon would have continued to rely upon the decisions of the local office holding him to be qualified—although affirmed by your office—in the face of a decision of the Supreme Court holding the contrary view.

I have, therefore, no doubt whatever that Gaymon's relinquishment was induced by the belief that the charge of disqualification as made in Colcord's contest would be sustained by the department, on the authority of Smith *v.* Townsend. That he should desire under such circumstances to save the cost of his improvements and of the labor he had expended upon his entry, by its relinquishment, was natural, and cannot with fairness, be assailed as fraudulent.

His offer to sell to Hodges—so far from being an indication of bad faith—is, to my mind, a proof that there was no collusion between Gaymon and Colcord. The case of Cullins *v.* Leonard (17 L. D. 412), cannot be followed in the case at bar, for the reason that Leonard's contest was in bad faith and speculative—as he had held Pentz' relinquishment in his possession during the pendency of his contest against Pentz' entry, and frequently offered the same for sale.

The conclusions reached in your office decision (on review) of October 3, 1896, are affirmed. The contests of Hodges and Runyon will be dismissed and the entry of Colcord allowed to remain intact.

"EXHIBIT B."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Dec.* 1, 1894.

E. W. SIMPSON & W. R. COLCORD
v.
JOHN GAYMON. } Homestead Contest, Oklahoma.

The Commissioner of the General Land Office.

SIR: I have considered the case of E. W. Simpson and William R. Colcord *v.* John Gaymon brought here on appeal of Colcord from your office decision of March 21, 1893, affirming the decision of your local officers, dismissing Colcord's contest and holding intact Gaymon's homestead entry No. 95 of the N. E. ¼ of sec. 5, T. 11 N. R. 3 W. Indian meridian, Oklahoma City land district, Oklahoma.

Said N. E. ¼ of sec. 5 is described on the township plat as lots 2, 3, 12, 13, 14, 15, and 18; irregular subdivisions caused by the meandering of the North fork of the Canadian river which runs diagonally across said quarter section.

On April 25, 1889, John Gaymon made homestead entry of said land. Many contests were initiated against said entry. The first was that of Edward W. Simpson, filed June 5, 1889. The second was that of William R. Colcord filed July 23, 1889. The third was that of James L. Hodges filed August 23, 1889. It is unnecessary to recapitulate the others.

One ground of contest was that Gaymon's entry included lands on both sides of a meandered river. On December 12, 1891, this department decided that the North fork of the Canadian river ought not to have been meandered by the surveyors; and that John Gaymon's entry aforesaid, if in all other respects legal, shall be allowed to stand as though no meander lines had ever been run along said stream (L. & R. Press Book No. 232 page 190, and the case of Hattie Tuhrer, 12 L. D. 556).

17 Other gounds of contest alleged were disqualification by reason of illegal entries into the Oklahoma country and prior legal settlement.

On July 7, 1892, the local officers ordered a hearing between Simpson, contestant, and Colcord, cross-complain-t, on the one side, and Gaymon, the entryman on the other; Colcord having charged that both Gaymon and Simpson had entered and occupied land in the Oklahoma country before 12 o'clock noon, of April 22, 1889, in violation of the law.

At the hearing Hodges applied for permission to intervene in the case and to offer proof that he had settled upon the land on July 22, 1889. His application was denied and he appealed to your office.

Then Simpson abandoned his contest, and the hearing proceeded as between Colcord and Gaymon.

On September 13, 1892, the local officers recommended that Colcord's contest be dismissed and Gaymon's homestead entry be held intact. On appeal, your office, on March 21, 1893, affirmed said decision and on April 7, 1893, Colcord appealed to this department.

On April 12, 1893, Gaymon relinquished to the United States all his right, title and interest in the premises and his entry was canceled. On the same day, April 12, 1893, Colcord made homestead entry No. 6850 of said land.

Upon the cancellation of Gaymon's entry by his voluntary relinquishment, all contests pending against it necessarily abated. There remained nothing for the department to do, and this case was closed.

I concur in your office decision that the local officers did not err in rejecting Hodges' application to intervene in the pending case, under the circumstances, in the exercise of their sound discretion.

April 17, 1893, Hodges filed a motion for a review by your office of your office decision of March 21, 1893. By letter H of June 19,

1893, your office suspended action on said motion until the appeal of Colcord has been disposed of by the department.

18 Said motion was filed too late, ten days after Gaymon's appeal to this department, and five days after Gaymon's appeal to this department, and five days after the relinquishment and cancellation of his entry. It is hereby denied; but without prejudice to any rights which Hodges may lawfully assert and maintain against the present entryman. With your office letter H of October 19, 1893, you transmitted sundry papers relating to a contest initiated on April 12, 1893, against Colcord's entry made on April 12, 1893, as aforesaid. Said papers are returned to your office for appropriate action.

The papers transmitted with your official letter H of July 27, 1893, are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

Endorsed: No. 2918—James L. Hodges, plaintiff, *vs.* William C. Colcord *et al.*, defendants—Petition—Filed in district court, Oklahoma county, O. T. June 1, 1901—B. D. Shear, clerk, by M. McKinley.

19 And afterwards, to wit, on the 10th day of July, 1901, said defendants William C. Colcord, Henry S. Colcord, C. F. Colcord and Mary L. Griffith, filed their demurrer in said district court to said petition which demurrer is in words and figures as follows:

TERRITORY OF OKLAHOMA, } *ss:*
Oklahoma County, }

In the District Court.

JAMES L. HODGES, Plaintiff,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. Colcord, and Mary L. Griffith, Defendants. } Demurrer.

Come now the defendants above named and demurrer to the petition of the plaintiff filed herein upon the following grounds, to wit:

1. Said petition does not state facts sufficient to constitute a cause of action against these defendants or any of them.

2. Said petition does not state facts sufficient to authorize the court to render any judgment whatever in said pretended action except to dismiss same.

3. Said petition does not state facts sufficient to give the court jurisdiction of the subject-matter of the action or the parties thereto.

J. R. KEATON,
Attorney for Defendants.

Endorsed: No. 2918—James L. Hodges, plaintiff, *vs.* William C. Colcord, —, defendants—Demurrer—Filed July 10, 1901, B. D. Shear, clerk, by M. McKinley, deputy.

20 And afterwards on the 23 day of September, 1901, said cause came on for hearing on said demurrer, and said petition and demurrer having been read to the court and argued by counsel the court sustained said demurrer and the plaintiff refusing to amend and electing to stand on his demurrer, the court entered final judgment dismissing said cause which said final judgment is in words and figures as follows:

TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court.

JAMES L. HODGES, Plaintiff,
vs.
C. F. COLCORD ET AL., Defendants. } Journal Entry of Judgment.

Now on this 23rd day of September, 1901, the same being one of the regular judicial days of the September, 1901, term of said court, the above-entitled action came regularly on for hearing, according to previous assignment, upon the demurrer of defendants to plaintiff's petition and the court having seen and examined said petition and demurrer and having heard the arguments of counsel, both for plaintiff and defendants and being fully advised in the premises finds that said demurrer should be sustained.

It is therefore considered and ordered that the said demurrer of defendants to plaintiff's petition be and the same hereby is sustained, thereupon counsel for plaintiff elect to stand upon said petition and decline to amend same, whereupon it is further considered, ordered and adjudged that said petition and action be and the same hereby are dismissed at plaintiff's cost taxed at $——.

Thereafter and on the same date counsel for plaintiff ask an extension of time of sixty days within which to prepare and serve a case-made for the supreme court of Oklahoma Territory, which is by this court granted and defendants are allowed ten days thereafter within which to suggest amendments to said case-made, the same to be settled and signed upon five days' written notice by either
21 party to the adverse party or at such time and place as counsel for said parties may agree upon.

B. F. BURWELL, *Judge.*

The foregoing contains a true and correct statement of all the pleadings, motions, orders, findings and proceedings upon which judgment was rendered.

J. S. JENKINS,
Attorney for Plaintiff.
J. R. KEATON,
Attorney for Defendants.

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

I, the undersigned attorney for the defendant in the foregoing suit, certify that the foregoing case was duly served on me this the 16″ day of November, 1901, and waive notice of settlement.

J. R. KEATON,
Attorney for Defendants.

Filed Jan. 24, 1902.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

This is to certify that the foregoing above case-made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same, as above set forth and as corrected by me, is true and correct, and contains a true, full correct and complete statement of all the pleadings, motions, orders, evidence, findings, proceedings and judgments had in such case; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court, and file the same of record as provided by law.

Witness my hand at Oklahoma city, O. T., the 12th day of Dec., 1901.

B. F. BURWELL,
Judge District Court.

Attest:
[SEAL.] B. D. SHEAR, *Clerk,*
By M. McKINLEY, *Deputy.*

Filed Jan. 24, 1902.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Filed district court Oklahoma Co., O. T., Jan. 22, 1902.
B. D. SHEAR, *Clerk,*
By M. McKINLEY, *Deputy.*

Endorsed: 1193—James L. Hodges, plaintiff, *vs.* William C. Colcord, *et al.* defendants—Case-made—Filed Jan. 24, 1902, Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

22 And afterward, to wit, at the June, 1902, term of said supreme court on the second day of September, 1902, there was filed in said supreme court, a motion to revive in name of heirs, which motion reads in words and figures as follows, to wit:

23 In the Supreme Court within and for the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLcord, C. F. Colcord, Mary L. Griffith, Defendants in Error.
} Motion to Revive in Name of Heirs.

Come now David J. Hodges, Willie E. Hodges, minor, by his next friend David J. Hodges, Ella M. Parker and Gertrude M. Hodges, heirs-at-law of James L. Hodges, and represent and show to the court that the plaintiff in error James L. Hodges died on or about the 1st day of August 1902, and that David J. Hodges, Willie E. Hodges, minor, Ella M. Parker and Gertrude M. Hodges are his children, and heirs-at-law; that the land in controversy in this suit, was the homestead of James L. Hodges at the time of his death, and that on his death his right in said land descended to his heirs above named.

Wherefore, the above-named heirs of James L. Hodges suggest to the court the death of their father, James L. Hodges, the plaintiff in error, and move this hon. court to revive this cause in the name of his said heirs.

J. S. JENKINS,
Attorney for the Heirs of James L. Hodges, Dec'd.

Aug. 30th, 1902.

We hereby accept service of the foregoing motion and consent that a proper revivor of said action be made.

SHARTEL, KEATON & WELLS,
Attorneys for Defendants in Error.

Endorsed: 1193—James L. Hodges, pl'ff in error, *vs.* William C. Colcord, Henry S. Colcord, C. F. Colcord and Mary L. Griffith, def'ts in error—Motion to revive cause in name of heirs of pl'ff in error.—Filed: Sept 2, 1902—Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

24 And thereafter at the June, 1902, term of said supreme court, on the second day of June, 1902, the following proceeding was had in said cause, to wit:

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD ET AL., Defendants in Error.
} #1193.

Ordered by the court: that this cause be taken on briefs and record.

25 And afterward at the June, 1902, term of said supreme court, on the third day of September, 1902, the following proceeding was had in said cause, to wit:

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD ET AL., Defendants in Error. } # 1193.

And now this cause comes on for consideration by the court, upon the application for revivor in the name of the heirs of James L. Hodges, plaintiff in error, deceased, and it is now

Ordered by the court: That this cause be revived in the name of the heirs, to wit: David J. Hodges, Willie E. Hodges, minor, by his next friend David J. Hodges, Ella M. Parker, Gertrude M. Hodges heirs-at-law of the said James L. Hodges, deceased.

26 And thereafter, to wit, at the June, 1902, term of said supreme court, on the fourth day of October, 1902, the following proceeding was had in said cause, to wit:

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD ET AL., Defendants in Error. } # 1193.

And now this cause comes on for final determination by the court upon the record and briefs of both parties submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed at the cost of plaintiff in error.

Opinion by Beauchamp, J., all the justices concurring except Burwell, J., who presided in the trial of the cause below, not sitting, and Irwin, J., absent.

And said opinion is in words and figures as follows, to wit:

27 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed October 4, 1902.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. COLCORD, and Mary L. Griffith, Defendants in Error. } No. 1193.

Syllabus.

1. Contest—Preference right of entry.—Where A has a homestead filing upon a tract of Government land that is subject to homestead entry, and B, while said homestead filing is intact, enters thereon and makes settlement, and one day after the settlement of B, C files a contest in the local land office, charging that A is disqualified to hold the land covered by his filing, and from obtaining title thereto under the homestead laws, by reason of having entered the Territory during

the prohibited period, and claims a preference right; and subsequently, and while said contest is pending, A relinquishes his filing to the Government, and the Land Department holds the relinquishment to be the result of the contest by C, Held, that the preference right of C is not defeated or impaired by the adverse settlement claim of B, acquired subsequent to the entry of A.

2. A homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain, and precludes it from subsequent homestead entry or settlement until the original entry is canceled or declared forfeited; in which case the land reverts to the Government as a part of the public domain, and becomes again subject to entry under the land laws of the United States. (The rule in McMichael *v.* Murphy, *et al.*, decided this term, not officially reported, followed.)

Error from the district court of Oklahoma county.

B. F. Burwell, trial judge.

Affirmed.

J. S. Jenkins, for plaintiff in error.
Shartel, Keaton and Wells, for defendants in error.

Statement of Case.

The plaintiff sued in the district court of Oklahoma county to recover the northeast quarter of section five (5), township eleven (11) north, range three (3) west Indian meridian, upon the assumption that the defendants hold in trust for him.

The petition alleges that John Gayman entered upon the land in controversy prior to twelve o'clock noon of April 22nd, 1889, in violation of law, and the proclamation of the President opening said land to settlement; that on the 25th day of April, 1889, said John Gayman filed a homestead entry on said land; that plaintiff entered and made settlement of the land in question on the 22nd day of July, 1889; that William R. Colcord, father of the defendants herein, filed a contest against the said entry of said Gayman on the 23rd day of July, 1889, on the grounds of the disqualification of Gayman; that plaintiff, Hodges, filed a contest against the entry of Gayman, August 23rd, 1889; that on the 12th day of April, 1893, Gayman relinquished his filing to the United States, which relinquishment was written on the back of his duplicate receipt, and is as follows:

"I hereby relinquish all my right to and interest in and to the Government of the United States, and ask that my entry be cancelled of record. This relinquishment is made for the reason that my entry is voidable, for the reason that I was in the Oklahoma country at noon of April 22nd, 1889, and so held by the decision of the Supreme Court of the United States in the case of Smith *v.* Townsend.

JOHN GAYMAN.

Subscribed to and acknowledged before me this 12th day of April, 1892.

D. D. LEACH, *Register*."

28 On the same day said relinquishment was filed, Colcord filed homestead entry on said land, being H. E. number 6850. The rights of the plaintiff and Colcord were determined before the Land Department in favor of Colcord, the Land Department holding that the relinquishment of Gayman was the result of the contest by Colcord, and that the settlement of Hodges was made while the entry of Gayman was intact, and that he acquired no right thereby superior to the right of Colcord, and awarded the land to Colcord. A patent was issued to Colcord, June 13, 1899; that since the settlement of plaintiff upon said land, and at the time the relinquishment of Gayman was made and filed, the plaintiff was and is residing upon said land, and that he has continued to reside upon and cultivate said land for more than five years and, having fully complied with the requirements of the homestead laws, is entitled to the patent for the same; that the Land Department erred in awarding the land to Colcord, but that the same should have been awarded to plaintiff; that William R. Colcord, deceased, and that the defendants are the heirs of William R. Colcord who are now claiming said land."

The prayer of the petition was that a trustee be declared, and the defendants be decreed to make conveyance of the land to plaintiff. A demurrer was interposed by the defendants on the grounds that the petition did not state facts sufficient to constitute a cause of action, which, upon consideration, was sustained by the trial court. The suit was thereupon dismissed, and judgment for costs rendered against plaintiff. The plaintiff brings the case here upon petition in error for review.

Opinion of the court by BEAUCHAMP, *J.*:

The issue which arises is this: Did the court below err in deciding that the petition of the plaintiff did not state a cause of action? And the only question raised by the briefs in this case is, whether a party can acquire, by settlement upon a tract of Government land, covered by a homestead filing of a person who is disqualified under the act of Congress opening the land to settlement from making an entry thereto, a right superior to that of one who, on the following day, contests the entry upon the grounds of disqualification of the entryman, and succeeds, by reason of the contest, in having the entry cancelled?

The plaintiff contends that the filing of Gayman was void, therefore did not segregate the land in controversy from the public domain; that Gayman had no rights to the land, and that Colcord could gain no rights by reason of his contest; that the land remained a part of the public domain until the 22nd day of July, 1889, when plaintiff, Hodges, made settlement thereon, but that the contest of Colcord instituted one day after Hodges' settlement gave him no rights, and that, therefore, the Secretary of the Interior erred in awarding the land to Colcord, and holding that the plaintiff acquired

no rights by reason of his settlement made on the 22nd day of July, 1889, and that the relinquishment filed by Gayman, while the contest of Colcord was still pending, and the same being the result of Colcord's contest, entitled Colcord to a preference right to file upon and acquire title to said land.

A homestead filing can only be allowed when the applicant shall file with the proper officials an affidavit covering the requirements of the acts of Congress entitling him to make such filing, including the necessary allegations of qualification; upon said affidavit being duly made and filed, and found to be sufficient by the proper authorities, the filing will be allowed, entitling the applicant to enter upon, occupy and, by fully complying with the requirements of the law, obtain title to public lands.

When a filing is allowed, the land covered thereby is segregated from the public domain; the entryman, until such filing is cancelled by the proper authorities, is entitled to the possession, and required to reside upon and cultivate to acquire title thereto. If the affidavit required is false, or the applicant mistaken as to his qualifications as alleged, and, in fact, he is disqualified, then, under such circumstances, his filing is voidable, and may be cancelled upon the proper proceeding before the proper authority, and the land reverts to the public domain. It is necessary, however, before an entry or filing can be cancelled, that the applicant shall be granted a hearing before the proper tribunal, and that authority shall first have judicially determined the facts which render the filing subject to cancellation. And in order to better guard against the abuses of the provisions of the homestead law, and that title to the public domain shall not be acquired by fraud, it is provided by the statute that any per-
29 son may institute contest for any of the reasons that would render such filing voidable. Section two of the act of May 14, 1880, provides—"That in all cases where any person has contested, paid the Land Office fees and procured the cancellation of any preemption, homestead or timber-culture entry, he shall be allowed thirty days to enter said land.

The filing of Gayman being regular and valid upon its face, and until cancelled in a proper proceeding, and by the proper authority, segregated the land from the public domain. Therefore, the settlement of Hodges could avail him nothing until the filing of Gayman was cancelled, and the only way to cancel Gayman's entry was by proper and authorized proceedings. Colcord instituted that proceeding before the proper tribunal, and succeeded in securing the cancellation of the fraudulent entry of Gayman, and was, under the provisions of the act before referred to, entitled to the preference, and, if taken advantage of within the time limited, the filing, and by compliance with the law, the title. Colcord did all that was required of him to entitle him to all these benefits. The filing of Gayman was cancelled through and under the proceedings instituted and prosecuted by Colcord; and he should have the reward guaranteed him by the statute.

Counsel for plaintiff in error contends that a filing under the circumstances of this case is void; therefore, being void, a contest of

the filing could give to the contestant no rights, and, being void, did not segregate the land from the public domain, therefore, was open to settlement or entry by the person qualified to make such settlement and entry. That the filing is void, he cites Calhoun *v.* Violet, 173 U. S. Supreme Court Report, page 60, and Patterson *v.* Wilson, 65 Pacific Reporter, 92.

It is true that in the case of Calhoun against Violet, *supra*, in the opinion delivered by White, justice, the following language appears: "Where the fact that the plaintiff had entered the Territory prior to the time fixed by the statute, and the proclamation of the President, having been conclusively determined, it follows inevitably, and is the legal result, that an entry to land made under such circumstances was void, and that the ruling of the Land Department, so holding, was correct." That in the case of Patterson *v.* Wilson, *supra*, by this court, in the opinion delivered by Hainer, justice, the language last above quoted is quoted with approval. Both are opinions and decisions rendered upon the question of the rights of litigants in a case wherein it was claimed by the one party, and held by the Land Department, that the facts and circumstances proved and determined in the case justified the conclusion that under such circumstances the entry and filings were void.

A judgment may be obtained against the defendant in the court having jurisdiction of the subject-matter, upon a return of the proper officer showing due service. The facts may be that no service was had whatever. Therefore, under such circumstances, the judgment so rendered is voidable; but being regular upon its face, under many statutes, would cloud the title of the defendant to real property, and that, until by a proper proceeding in a proper court, the facts rendering such judgment void are shown to exist and the judgment vacated.

In case an entryman has secured a fraudulent entry upon the public lands by making the necessary affidavits, and unless the matter is called to the attention of the proper authorities in an authorized proceeding, the applicant may eventually acquire title to the tract of land in controversy covered by such fraudulent and voidable entry, and convey the same to an innocent purchaser, thereby displace the land covered from the public domain forever. And for this reason the statute above quoted was enacted.

It is contended that because Hodges was actually upon the land as a settler at the time Gayman filed his relinquishment, that his right attached between the time of the relinquishment and the filing by Colcord. This would be true if it were not for the fact that Colcord was a contestant for the land, and by virtue thereof was entitled to the preference right of entry.

Now, many cases may be found decided by the Interior Department, wherein it is held that the rights of a settler upon Government land attach at the instant the entry upon the land is cancelled, and as between parties upon land covered by an entry it may be said that the first settler, in point of time, will be entitled to enter such land.

30 We are of the opinion that under the law the doctrine will be affirmed that a settlement made and covered by an existing entry confers no superior, or any right whatever as against the contestant where such entry is cancelled as a result of a contest for a preference right. If this were not true, the very purpose for which the law was passed, which gives to the successful contestant a preferred right of entry, would be defeated.

The law, in our judgment, contemplates that persons who go to the trouble and expense of successfully contesting an entry, shall enjoy the fruits of their victory. The Land Department, by its decision, a copy of which is attached to plaintiff's petition, found from the evidence before them that the relinquishment of Gayman was the result of the contest of Colcord, and awarded the land to Colcord. In this we find no error. Upon the facts and under the circumstances found by the Land Department the conclusions of law were correct.—Sproat *v.* Durland, 2nd Oklahoma, page 24.

The judgment of the trial court, sustaining the demurrer and dismissing the action with costs to the plaintiff, was right, and must, therefore, be affirmed, with costs to plaintiff in error.

Burwell, justice, having presided in the court below, not sitting; all the other justices concurring, except Irwin, J., absent.

31 And on the 22nd day of October, 1902, said appellants filed in the supreme court of Oklahoma Territory their petition for appeal to the Supreme Court of the United States, together with affidavits of amount in controversy, and assignment of errors; which said petition, affidavits and assignment of errors read in words and figures as follows, to wit:

32 TERRITORY OF OKLAHOMA:

In the Supreme Court of said Territory.

JAMES L. HODGES, Plaintiff in Error, vs. WILLIAM C. COLCORD, HENRY S. COLCORD, Charles F. Colcord, & Mary L. Griffith, Defendants in Error.	Petition in Equity.

The above-named appellants, David J. Hodges, Ella M. Parker, Gertrude M. Hodges and Willie E. Hodges, heirs-at-law of the appellant, James L. Hodges, conceiving themselves aggrieved by the judgments, orders, and decrees made and entered in the above-entitled cause, by the supreme court of the Territory of Oklahoma, for the reasons specified in the assignments of errors filed and the assignment of errors filed herewith, and for the further reason that the value of the land in controversy is $20,000 as shown by affidavit hereto attached, prays that they may be allowed an appeal to the Supreme Court of the United States, and that a transcript of the record and proceedings and exhibits upon which said orders, judg-

ments and decrees were made and duly authenticated, may be certified to the Supreme Court of the United States, D. C.

J. S. JENKINS,
Attorneys for Appellants.

Endorsed: 1193—James L. Hodges, appellant, *vs.* William C. Colcord, Henry S. Colcord, Charles F. Colcord, Mary L. Griffith, appellees—Petition for appeal—Filed Oct. 22, 1902—Benj. F. Hegler, clerk supreme court.

33 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, CHAS. F. Colcord, & Mary L. Griffith, Defendants in Error. } Affidavit.

Personally appeared before me W. H. Clutter, who being duly sworn on his oath says: That he is well acquainted with the value of the northeast quarter of sec. 5, twp. eleven (11) north, range three (3) W. I. M., situated in Oklahoma county, Territory of Oklahoma, and that said land is of the value of $20,000.00 dollars.

W. H. CLUTTER.

Subscribed and sworn to before me this 21st day of October, 1902.

CHARLES EDWARD JOHNSON,
[SEAL.] *Notary Public.*

My commission expires Sep. 15, 1906.

Endorsed: James L. Hodges *vs.* William C. Colcord *et al.*,—Affidavit as to amount in controversy—Filed Oct. 22, 1902—Benj. F. Hegler, clerk supreme court.

34 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, CHAS. F. Colcord, & Mary L. Griffith, Defendants in Error. } Affidavit.

Personally appeared before me Will H. Clark who being duly sworn on his oath says; That he is well acquainted with the value of the northeast quarter of sec. 5, twp. eleven (11) north, range three (3) W. I. M., situated in Oklahoma county, Territory of Oklahoma, and that said land is of the value of $20,000 *dollars.*

WILL H. CLARK.

Subscribed and sworn to before me this 21st day of October, 1902.

CHARLES EDWARD JOHNSON,
[SEAL.] *Notary Public.*

My commission expires Sep. 15, 1906.

Endorsed: 1193—James L. Hodges *vs.* William C. Colcord, *et al.*,—Affidavit as to amount in controversy—Filed Oct. 22, 1902, Benj. F. Hegler, clerk supreme court.

35 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

JAMES L. HODGES, Appellants,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, Charles F. Colcord, & Mary L. Griffith, Appellees. } Assignment of Error.

And now comes the above-named appellants, David J. Hodges, Eila M. Parker, Gertrude M. Hodges and Willie E. Hodges, heirs-at-law of the appellant, James L. Hodges, and says: That in the decrees, judgments and orders made in the above-entitled cause in the supreme court of the Territory of Oklahoma, many and manifest errors have intervened to the great prejudice of the rights of the appellants and the said decrees, judgments and rulings are erroneous for the following reasons:

1st. The court erred in sustaining the demurrer interposed to the petition of appellants, and holding that said petition did not state facts sufficient to constitute cause of action.

2nd. The court erred in holding that the contest of William R. Colcord caused the relinquishment of John Gayman to be filed in the land office on the 12th day of October, 1892, and that by reason of said contest of said William R. Colcord, he was entitled to the preference right to file on said land in controversy.

3rd. The court erred in holding that the filing of John Gayman was voidable and not void, and that said filing segregated said land from the public domain and that said James L. Hodges gained no rights by reason of his settlement on said land prior to the filing of said contest by William R. Colcord.

36 4th. The court erred in holding that title of the land in controversy may be acquired by such fraudulent and voidable entry as aforesaid, thereby displacing the land covered, from public domain forever.

Wherefore plaintiffs in error pray that the judgments, decrees and orders of the supreme court of the Territory of Oklahoma be reversed, and that plaintiffs in error have such judgment as they are entitled to under the law and in equity.

J. S. JENKINS,
Attorneys for Appellants.

Endorsed: 1193—James L. Hodges, *v.* William R. Colcord, *et al.*,—Assignment of errors—Filed Oct. 22, 1902, Benj. F. Hegler, clerk supreme court.

37 And afterwards, to wit, on the 30th day of Oct. 1902, said appellants filed in the supreme court of the Territory of Okla-

homa their order allowing appeal in said cause, which order reads in words and figures as follows, to wit:

38 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. COLCORD, and Mary L. Griffith, Defendants in Error. } Order.

Now, on this the 30th day of October A. D., 1902, come the plaintiffs in error, by their attorney J. S. Jenkins, and file herein, and present to the court, their petition and assignment of errors, praying for an allowance of an appeal and that a transcript of the record and proceedings, duly authenticated, may be sent to the Supreme Court of the United States, and that such *order* and further proceedings may be had as may be proper in the premises. Upon proper consideration whereof, I hereby allow the appeal and direct and command the clerk of this court to transmit to said Supreme Court of the United States, a true, correct, and certified transcript of the record and proceedings herein.

It is further ordered, that the plaintiff- in error shall give bond for the payment of all costs that may accrue in said proceedings or in lieu of such bond, shall deposit with the clerk of the United States Supreme Court, such sum as may be required by said clerk as security for all costs that may accrue in said action, and shall pay all costs in this court, subject to the final order taxing costs herein.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: 1193—James L. Hodges *vs.* William C. Colcord *et al.*—Order allowing appeal. Filed Oct. 30, 1902. Benj. F. Hegler, clerk sup. ct.

39 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Appellant,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD, and Mary L. Griffith, Appellees.

To the appellees, Wm. C. Colcord, Henry S. Colcord, Chas. F. Colcord, and Mary L. Griffith, and their attorneys of record, Shartel, Keaton & Wells:

You and each of you will take notice that the appellants, The Heirs of James L. Hodges, have filed affidavits in the supreme court of the Territory of Oklahoma, in support of their petition, for an ap-

peal to the Supreme Court of the United States, showing the value of the land in controversy to be more than $5000, you are here notified that said application and petition for an appeal to the Supreme Court of the United States will be presented to the chief justice of the Territory of Oklahoma for his allowance on or before the 30th day Oct., 1902, and you are admonished to file your affidavits controverting the value of said land in controversy, if any you desire to make.

J. S. JENKINS,
Attorney for Appellants.

Service of the above notice is hereby accepted this 27th day of Oct., 1902.

SHARTEL, KEATON & WELLS,
Attorneys for Appellees.

Filed: Oct. 29, 1902—

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed: 1193—James L. Hodges *vs.* William C. Colcord, *et al.*—Notice presentation of petition for appeal—Filed Oct. 29, 1902—Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

40 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

In the Supreme Court.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 39 pages, numbered from 1 to 39, inclusive, are a true and complete transcript of the record and all proceedings in said supreme court in the case of James L. Hodges, plaintiff in error, *vs.* William C. Colcord, Henry S. Colcord, C. F. Colcord and Mary L. Griffith, defendants in error, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 3rd day of November, A. D. 1902.

[Seal Supreme Court, Territory of Oklahoma]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

41 [Endorsed:] No. —. In the Supreme Court of the United States. James L. Hodges, appellant, *vs.* William C. Colcord, *et al.*, appellees. Appeal from supreme court of Territory of Oklahoma. Transcript of proceedings.

Endorsed on cover: File No. 18,727. Oklahoma Territory supreme court. Term No. 499. David J. Hodges, Ella M. Parker, Gertrude M. Hodges, & Willie E. Hodges, heirs-at-law of James L. Hodges, appellants, *vs.* William C. Colcord, Henry S. Colcord, Charles F. Colcord, and Mary L. Griffith. Filed November 7", 1902.

4—499

.....IN THE.....

Supreme Court of the United States

OCTOBER TERM 1903.

DAVID J. HODGES, *ELLA M. PARKER,* *GERTRUDE W. HODGES and* *WILLIAM E. HODGES,* *Heirs at Law of* *JAMES L. HODGES,* *Appellants.* *vs.* *WILLIAM C. COLCORD,* *HENRY S. COLCORD,* *CHARLES F. COLCORD, and* *MARY L. GRIFFITH,* *Appellees.*	*NO 499*

BRIEF OF APPELLANTS

MAY IT PLEASE THE COURT:

This case involves lots 2, 3, 12, 13, 14, 15 and 18 in Section 5, Township 11, North Range 3 west, Oklahoma District O. T.

John Gayman made a pretended homestead entry on the above described land April 25, 1889.

James L. Hodges, the father of the appellants, made settlement on said land on the 22nd day of July, 1889. (Trans. 1) William R. Colcord, the father of the appellees, filed a contest

against the entry of John Gayman August the 23rd, 1889. (Trans. 2) The United States issued a patent to said land to said William R. Colcord on the 13th day of June, 1899. (Trans. 5.) That said William R. Colcord died about the 1st day of January 1901. James L. Hodges died on or about the 1st day of August, 1902, and the cause was revived in the name of his heirs in the Supreme Court of the Territory. (Trans. 15.) Said William R. Colcord died before the institution of this suit. On April 12, 1893 John Gayman filed his relinquishment to the United States. On the same day William R. Colcord made entry on the land.

The questions involved are these: It is contended by the appellants that James L. Hodges was the first legal settler on the land, and that by reason of his settlement made on July 22, 1889, and his improvements, his rights attached to the land, and that the entry made by John Gayman on the 25th day of April, 1889, was void, because John Gayman had entered the Oklahoma country before noon on April 22nd 1889, and because he was in the Oklahoma country at the hour of noon April 22, 1889. It is contended by the appellants that Gayman's entry was void, and did not segregate the land from the public domain It is further contended by the appellants that James L. Hodges was a settler on said land at the time John Gayman filed his relinquishment on the 12th day of April, 1893; That said relinquishment was not induced by Colcord's contest, and therefore Hodges' interest attached to the land instantly on the filing of the relinquishment by Gayman. It is further contended by appellants that at the time Colcord filed his contest against John Gayman's entry on the 23rd day of July, 1889, he had full notice of the settlement of James L. Hodges, which was made on said land on the 22nd day of July, 1889.

The errors complained of in the journal entry of the District Court. is that it erred in sustaining the demurrer to the petition and in dismissing plaintiff's cause of action.

BRIEF OF THE ARGUMENT.

The case of the Hastings and Dakota R. R. Company vs. Whitney, 132 U. S. 337, 10 Supreme Court reporter 112, is a case relied on by the appellees. In that case the United States

granted the State of Minnesota July 4, 1866, certain lands to aid in the construction of said railroad, subject to conditions therein stated, and on the 7th day of March 1868, the railroad was definitely located; and the rights of the railroad attached to the land granted, except such as had been appropriated prior to that date. Bently S. Turner, who was a soldier in actual service of the United States, through his agent had filed on 80 acres of land included in said railroad grant, on the 8th day of May 1865. The railroad claimed that Turner had not done acts sufficient for his interest to attach, and practically that his filing was void. The railroad claimed that the land had not been occupied or improved by Turner as required by law, and that his affidavit was insufficient. Turner's filings remained of record till September 30, 1872, when said entry was canceled by proper authority. On the 7th day of May 1877, Julia D. Whitney filed on Said land and in due course, a patent was issued to her by the United States. The trial court held as conclusion of law, that Turner's entry was void, that the title to the land vested in plaintiff under its grant, and that the entry of Julia D. Whitney, thereon, was unauthorized and of no effect. The Supreme Court of Minnesota reversed the decision. Turner filed under Sec. 2293 of the Revised Statutes which is set out in the decision. The court then said: "The question presented for our consideration is whether, upon the facts found and admitted, the homestead entry of Turner upon the land in controversy except it from the operation of the land grant under which the plaintiff in error claims title. "In this case Justice Lamar, in rendering the opinion of the court says: The doctrine first announced in Wilcox vs Jackman 13 Pet 498; that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of the public lands, that no subsequent law or proclamation will be construed to embrace it, has been re-affirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country. In Whitherspoon vs. Duncan 4 Wal 210, this court decided in accordance with the decision in Carroll vs. Safford 3 How 441 that lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained, and the court

further held that this applies as well to homesteads and pre-emption as to cash entries; in either case, the entry being made and the certificate being executed and delivered, the particular land entered thereby becomes segregated from the mass of the public lands, and takes the character of private property. The fact that such entry may not be confirmed by the land office on account of any alleged defect therein, or may be cancelled or declared forfeited on account of non-compliancce with the law, or even declared void, after a patent has issued, on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of the public lands.

In the light of these decisions, the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face, has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale or grant until the original entry be cancelled or declarad forfeited, in which case the land reverts to the government as a part of the public domain, and again becomes subject to entry under the land laws. The correctness of this holding has been sustained by this court in the case of railway company vs. Dunmever 113 U. S. 629, 5 Supreme court Lt Rep. 566 and the principle applied to a railroad in the act under which the plaintiffin error claims title to tract in controversy.

In that case a homestead claim has been made and filed in the land office by one Miller, and there recognized by a certificate of entry, before the line of the company's road was located. Subsequently to the location he abandoned his entry, and took a title under the railway company, and his homestead entry was cancelled. One G. B Dunmeyer, then entered the land under the homestead law, claiming that by the cancellation for abandonment, it had passed back into the mass of public lands, and was not brought within the grant; and upon that claim ousted the defendant in error, who afterwards brought action against the railroad company for a breach of covenant, obtaining a judgment in the court below, which was afterward affirmed by this court. The court said, Justice Miller delivering its opinion "the record shows that on July 25, 1866, Miller made a homestead entry on this land which was in every respect valid. In the lan-

guage of the act of congress, this homestead claim had attached to the land and it therefore did not pass by the grant. Of all the words in the English language, this word "attached" was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inherent right to the land was instituted. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. "It is argued by the company that, although, Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the time of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed; the exception no longer operated and the land reverted to the company; that the grant by its inherent force reasserted itself, and extended to or covered the land as though it had never been within the exception. We are unable to perceive the force of this proposition. No attempt has ever been made to include lands reserved to the United States, which reservation afterward ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservation, and were of great value. Nor is it understood that, in any case where lands had been otherwise disposed of, their reservation to the government brought them within the grant. Why should a different construction apply to lands to which a homestead or pre-emptim right had attached? Did congress intend to say that the right of the company also attached, and which ever proved the better right obtained the land"? Counsel for plaintiff in error contends that the case just cited has no application to the one we are now considering, the difference being that in that case, the entry existed at the time of the location of the road, was an entry valid in all respects, while the entry in this case was invalid on its face, and in its inception; and this entry having been made by an agent of the applicant, and based upon an affidavit which failed to show the settlement and improvement required by law, was, on its face,

not such a proceeding in the proper land office, as could attach even an inchoate right to the land.

We do not think this contention can be maintained. Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; Second, he must make a formal application; and third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made,—the land is entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such may be afterwards cancelled on account of these defects by the commissioner, or on appeal by the secre- of the interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the department, and on failure to do so, the entry may then be cancelled. But these defects whether they be of form or substance, by no means render the entry absolutely a nullity. So ong as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their actions remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's road an examination of the tract books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry of Record, accepted by the proper officers in the proper office, together with the application and the necessary money—an entry the imperfections and defects of which could have been cured by a supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of

the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest danger to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based. As was said in the Dunmeyer case, supra: "It is not conceivable that congress intended to place these two parties (homestead and pre-emption claimants on the one hand, and the railway company on the other) as contestants for the land, with the right in each to require proof of the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations."

In addition to this, Section 2308 of the Revised Statutes provides: "Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the army or navy of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered, etc." That act is a curative act, or rather, one putting a construction upon the prior act of 1864, under which the Turner entry was made. The effect of it is to declare service in the army or navy of the United States by applicant, at the date of an entry made under the act of 1864, equivalent to actual residence upon the land by him.

In that view of the case the affidavit in the the Turner entry was sufficient; for, in contemplation of law, he was then residing upon the tract embraced in his entry. Supreme Court Reporter Vol. 10, 114-15.

This is the leading case reliedon by the defendants, it lays down the doctrine contended for by plaintiff. The court will observe that this is a suit by a railroad against a homesteader. The uniform rule is that a railroad cannot contest a homesteader. If a homesteader has done any act by which his rights attach, before the location of the road, that would except the land from

the railroad grant. This provision is in all the acts of congress granting land to a railroad. When a right attaches, the land is excepted from the grant, and if from any cause the homesteader's entry is canceled, the land reverts to the United States and not to the railroad company. (See all the authorities refered to in the above case.)

The filing of Turner referred to was not void, it was such a filing as could be amended, or supplemental and Sec. 2308 of the Revised Statutes made it valid, and it was valid at the time of the permanent survey of the railroad, and hence, excepted it from the grant. When the entry was afterward cancelled, it reverted to the United States, so that when Whitney filed, her rights attached to the land.

When Justice Lamar rendered this decision he intended to state the law of that case, and anything else would be a dictum of the court, and would not be binding on any court. If this decision is intended to apply to all filiugs and entries in the land office, and bears the construction given it by the defendants, then it would completely tie the hands of congress, from all future disposition of the public domain. The court will observe that in all cases where the decisions refer to an entry segregating the land, it is such an entry as would attach an interest to the land, in other words, it would initiate a right to the land that would eventually ripen into a title. If such filings were defective they could be made good by showing the truth.

On March 1, 1889, (25 Sta. p 757, 759) congress passed an act with reference to Oklahoma land, containing this provision: "that the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant, and the provisions of twenty-three hundred and one of the revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are open to settlement by act of Congress shall not be permitted to occupy or make entry upon such lands or lay any claim thereto.

On March 2, 1889, (25 St. pp 980, 1005) congress passed an act (with reference to Oklahoma land) containing this provision: "and provide further, that each entry shall be in square form, as nearly as practicable, and no person be permitted to enter more than one quarter section thereof; but until said lands are open for settlement by proclamation of the president no person shall be permitted to enter upon and occupy the same and no person violating this provision shall ever be permitted to enter any of said lands or acquire title thereto."

On the 23rd day of March, 1889, the president issued his proclamation containing this warning:

Warning is hereby again expressly given that no person entering upon and occupying said lands before said hour of 12 o'clock, noon on the 22nd day of April, 1889, herein before fixed, will ever be permitted to enter any of said lands or acqure any rights thereto; and that the officers of the United States will be required to strictly enforce the aet of congress to the above effect. (26 St. p 1546)

If you give the decision in the case of Hastings and Dakota R. R. vs. Whitney, the construction contended for by defendants, then the acts of congress, and the proclamation of the president would be nugatory, and a party by fraud and perjury, could acquire rights, which he could not gain by swearing the truth. According to the doctrine contended for the defendants it was not necessary to obey the law above quoted. A party could enter the Oklahoma country before the time set, by law, select his land, go to the land office and swear falsely and by said fraud and falsehood, initiate a right to 160 acres of land, that he could make entry and acquire rights, in other words, he would initiate a right to the land. In the language of Justice Lamar, his rights would attach, and the land would be segregated and take the nature of private property."

This would be impossible according to the acts of congress above quoted and the proclamation of the President, which state that no person violating such provision shall be permitted to make entry, or acquire any right thereto. If the above acts of congress, and the proclamation of the President are law, then how could John Gayman, who violated these laws as shown by

the record, make entry to the land in controversey? How could his rights attach to said land in the face of that law? How could his pretended entry segregate the land? Every act of Gayman in attempting to acquire a title to the land in controversy was void, and the land was not segregated by his acts.

If a person who entered Oklahoma in violation of law, could acquire a right in the land, by making a false affidavit, and obtain a filing that would segregate the land, then enough people could have entered the country to select every quarter section in the country, and then line up at the various land offices, and make filings on the entire country before an honest legal settler could obtain a single filing. Not a legal settler could enter the country without being a tresspasser. It follows as a matter of course that if Gayman could enter the country in violation of law and segregate one quarter section, and place it in such condition, that no one else could acquire any rights by settlement, or any other way, till his entry was cancelled, then ten thousand men could have done the same thing. It would have put it in the power of the violaters of law to enter every quarter section in the country, and then if they saw that they would be contested, they could take a confederate to the Land Office, file a relinquishment, and let his confederate file on the land and obtain a patent.

When the case of Hasting and Dakota R. R. vs. Whitney is read by the court, keeping in view the case under consideration by the court, the court will see clearly, that the Justice had in view lawful entries, and such entries as would attach an interest to the land, and such entry as might be amended, if it did not state all the facts I submit to the court that John Gayman could not amend his affidavit, by setting out the truth, so as to give him a right. The truth would have been fatal to John Gayman's entry.

I challenge the appellees attorneys to show a single case where the United States Supreme Court has held that the lands were segregated from the public domain, except where the entry man had some of the elements of a qualified entryman, and had not done some act by which his right would attach. In the sanction of congress to be there; and that when the hour of

case at bar the entryman, John Gayman, was absolutely prohibited from making entry, or acquiring any right in the lands above named. By perjury and deception, he might obtain a paper that purported to be an entry, and have the records show that he had made an entry on the land in controversy, but in that case the entry would be a deception and a falsehood, but it would not confer any rights on John Gayman, It would not give him any right or equity in the land. No interest would attach. The authorities of the land department would have to investigate the matter, and if it was shown that the party had entered the country in violation of law, then it would be the duty of the land department to hold that said entry was void ab initio. The pretended entry of John Gayman, not giving him any right to the laud in controversy, could not segregate the land. It could never ripen into a title according to the act of congress March 1 and 2 above quoted

The Oklahoma lands were opened under the homestead laws. What would the appellees say of pre-emption, timber culture, military, or bounty, or donation claim, filed in the Oklahoma Land Office? If the officers of the local land office should entertain, any one, or all of the above claims grant entry, and make a record of it on the books and maps of the land-office, would the appellees contend that such filings would segregate the land and give the entryman a right? Such entries have been entertained under the acts of congress, and the books are full of decisions sustaining the same.

Why not file any kind of a claim on the Oklahoma land, and hunt up these decisions to show that they are valid? Such a proceding would be absurd and, it is equally absurd to contend that a man who is absolutely prohibited from making entry, or acquiring right to the land, can, by perjury, acquire a right and then try to sustain that doctrine by quoting Justice Lamar, in the case above mentioned, and other decisions rendered under the land grant acts of long ago.

In the case of Smith vs. Townsend, 13 Supreme Court Reporter 634, Justice Brewer speaking for the court said.

"But it is said that the appellant was rightfully on the railroads company's right of way; that he had the express

noon of April 22nd arrived he had as an American citizen, possessing the qualifications named in the homestead laws the right to enter upon any tract within the territory for the purpose of making it his homestead. While he may have had all the qualifications prescribed by the statue, and there is nothing to prevent congress, when it opens a particular tract for occupation, from placing additional qualifications on those who shall be permitted to take any portion thereof. That is what congres did in this case. It must be presumed to have known the fact that on this right of way were many persons properly and legally there. It must also have known that many othtr persons were rightfully in the Territory Indian agents, deputy marshals mail clerks, and many others; and if it intends that these parties thus rightfully within the territory on the day named, should have special advantage in the entry of of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say "anv person who may wrongfully enter" etc. but "any person who may enter," rightfully or or wrongfully," is implied. There are special reasons why it must be believed that congress intended no relaxation of these disqualifications on the part of those on the company's right-of-way, for it is obvious that when a railroad runs through a country the settlers will immediately pour into it, and large cities wil shortly grow up along the line of the road; and it cannot be believed that congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right-of-way, and doubtless which would soon become the sites of towns and cities.

It may be said if this literal and comprehensive meaning is given to these words, it would follow that any one who, after March 2nd and before April 22nd, should chance to step with in the limits of the territory, would be forever disqualified from taking a homestead therein. Doubtless he would be in the letter of the statute; but if, at the hour of noon on April 22nd, when the legal barrier was by the president destroyed, he was, in fact, outside the limits of the territory, it may perhaps be said that if

within the letter he was not within the spirit of the law, and therefore not disqualified from taking a homestead. Be that as as it may, and it will be time enough to consider that question when it is presented; it is enough now to hold that one who was within the territorial limits at the hour of noon of April 22nd was, within both the letter and the spirit of the statute, disqualified to take a homestead therein.

The judgement of the Supreme Court of the Territory was right, and it is affirmed. Supreme Court Reporter, Vol. 13 page 637-38.

The Supreme Court of the United States has spoken on the subject, in the case of Calhoun vs. Violet, 19 Supreme Court Reporter, page 325. Justice White speaking for the court said:

The fact that the plaintiff had entered the territory prior to the time fixed by the statute and the proclamation of the president having been conclusively determined, it follows inevitably, as a legal result, that an entry of land made under such circumstances was void, and that the ruling of the land department so holding was correct. This leaves only open for our consideration the legal question whether Calhoun, because he was an honorably discharged soldier, was entitled to go into the territory before the designated time and make a valid entry of a homestead therein; the claim that he was authorized to do so is based on a proviso contained in section 13 of the act of March 2, 1889. (25 Stat. 980, 1005) which is as follows:

The above authorities show conclusively that John Gayman's entry was void and that no rights attached.

There are a great many decisions of the Supreme Court of the United States which hold that no rights attached, and there was no segregation of the land, notwithstanding the parties had performed all the three requirements stated by Justice Lamar in the case of Hastings and Dakota R. R. vs. Whitney above mentioned, since the rendition of that decision:

Where the patentee is a fictitious person, the filing and the patent are void. Muffitt vs. United States, 5th Supreme Court, Reporter, page 10.

An officer of the land department cannot make entry or

acquire any interest in the public land and any entry or filing so made is void. Lavagnio vs Whitney 70 Pac. 1046. Section 452 of the Revised Statutes of the United States reads as follows:

"The officers, clerks and employes in the general land office are prohibited from directly or indirectly purchasing or becomeing interested in the purchase of any of the public lands; and any person who violates this section shall forthwi th be removed from his office.

According to the contention of the appellees, if such officer should so far forget himself, as to make an affidavit in legal form, he might make entry, and acquire rights, notwithstanding the law. Such a doctrine is monstrous. The law says that a party who entered Oklahoma in violation of law could not make entry, the appellees say such persons could make entry, and segregate the land from the public domain. Which authority shall control this court ?

Where r pre-emption filing was obtained through fraud and a patent obtained, the patentee was trustee for the settler. Sanford vs. Sanford, 11th Supreme Court Reporter 666. This is a case where an entry was obtained, and the entryman's rights did not attach.

Where a person entered upon land in 1855, without right and the possession was continued without righ, the permission of the Register to prove up the possession and improvement, and to make entry under the pre-emption laws, were acts in violation of law and void.

Riley vs. Wells 14th Supreme Court Reporter 1166.

Where a Mexican land grant was confirmed in California the United States reserved a tract of land from settlement much larger than the grant, and when the grant was surveyed and approved by the Interior Department, that segregated the land from the public domain, and the surplus was subject to be disposed of under the land laws.

When the survey was made the state selected the overplus in lieu of Sec. 16 and 36 for the school land, before the survey was approved. After the survey was approved A filed on it as a homestead. Held that the state initiated the firse right

and was entitled to the land.

McCreary vs. Hascell. Supreme Court Reporter, Vol, 7, 176.

Where an inalienable land certificate was obtained and a forged power of attorney and a forged quit claim deed was executed in blank and patent obtained, and afterwards, the blank power of attorney, and the blank quit claim deed, were filled out and filed, these acts conveyed no title to the grantees. Grantees were trustees, and all the acts done by them are done as trustees. Where a bill in equity fails to show why the defendant did not discover certain frauds and deceits the bill is insufficient to disturb the party who is holding the title. Felix et al vs. Patrick. 12 Supreme Court Reparter, p 62.

Where a party intended to file on S. E. ¼ but filed on S. W ¼ and resided on S. E. ¼ for 30 years W filed on S. E. ¼ and obtained patent and sued for the land, a cross bill was filed to declare S. the trustee, no interest having attached by reason of his filing or patent. The holder of a patent in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired the prior right from the United States in course when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relation between him and a third person. Widdicombe vs. Childers, 8th Supreme Court Reporter, page 517 and the authorities there cited.

Where the order withdrew the land from sale no right legal or equitable, were acquired by occupation or settlement. Wood vs. Beach 15th Supreme Court Reporter, page 410.

Occupying land with intent to make homestead entry, but failing to make filing until the land is withdrawn, for the benefit of a railroad, gives the settler no right in law or equity. Maddox vs. Burnham, 15th Supreme Court Reporter 448.

Where land was awarded to a railroad company, that was occupied by a homesteader, the award was void (the distinction between void and voidable acts defined.) Week vs. Ridgman 16th Supreme Court Reporter page 72.

The land department cannot over-ride an act of congress. Where land is set apart for any purpose, such as a city, and a party is permitted to make filing, and it culminates in a patent, in violation of law, the patent is void and confers no right or equity on the patentee. Berfenning vs. St. Paul R. R. Company 16th Supreme Court Reporter 1018.

The act opening Oklahoma is different from other statutes which congress had a right to make, and the United States Marshal's entry was invalid. Payne vs. Robinson, 18 Supreme Court Reporter 337.

The doctrine that an entry regular on its face, segregates the land is not the law. All decisions of the Supreme Court of the United States decide only the case under consideration. They do not decide in advance, all cases that may arise, on the same subject, but under a different state of facts, and under different Statutes.

A man by the name of Holgate filed a relinpuishment in Feb- 1864, and the University selected said land May 10, 1864, but the secretary did not act on the relinquishment until 1871. Held that such selection of the land in May held the land notwithstanding the relinquishment was not noted till 1871. This being the case the land was selected by the university before the entry was cancelled of record and the right of the University attached notwithstanding the filing. Kean vs. Bryger, 16 Supreme Court Reporter, page 278.

A party who located Chippewa Scrip, and obtained patent, in violation of law, the patent was void, and the United States allowed him to take the land by purchase. Fee vs. Brown 16th Sup. Court Reporter 875.

Where there is a suit between a railroad company and a miner as to whether the stone quarry was exempt from a railroad grant; held that the title of the R. R. did not attach, although the interior department had not determined that the land was mineral in character. Northern Pacific R. R. Co. vs. John A. Soderberg, Vol. 24 Sup. Court Reporter 365.

Where the railroad has made a permanent survey according to the act of 1866 they have a vested right to the land in the

place limit, but not in the indemnity limit, till it makes selection under the apyroval of the secretary. The fact that the secretary entered an order reserving said lands from settlement, would be contrary to law, and without effect, and the interest of the railroad would not attach to said land but the rights of the settler would attach, notwithstanding the order of the secretary. Oregon and California R R. Co. vs. The United States, 23rd Supreme Court Reporter 615.

A. had filed a pre-emption claim and abandoned it, but the filing had not been cancelled of record. The railroad afterwards filed its claim; held that the claim of the railroad was valid notwithstanding the fact that A's entry had not been cancelled of record, the time for making the filing having expired. Northern Pacific R. R. Company vs. DeLacey, 19th Sup. Court Reporter 791.

Where the Secretary of the Interior withdrew indemnity land from sale and settlement without authority of law, such action was void and the rights of a settler on said land would attach and he had a right to file on said land and prove up and obtain a patent thereto. Hunt vs. Shultz, 21 Supreme Court Reporter, 309. Moore vs. Stone 21 Supreme Court Reporter 322. The The above doctrine re-affirmed 22nd Supreme Court Reporter 232.

The even numbered sections of land were not subject to entry by the railroad company and the land department could do no act that would give them a right to the land, no more than if it was an Indian reservation. Clark vs. Herrington, 22nd Sup. Court Reporter 872.

Where parties are contesting for land, the party who first initiates the rights should prevail, though neither party had a vested right against the United States. Shipley vs. Cowan an, 23 Co. Op. Page 424.

Where a party filed on public land under the Oregon donation act, had abanoned the same fourteen years before the R. R. filed its definite location, the rights of the railroad attached, notwithstanding the uncancelled filing. Oregon and California R. R. Co. vs the United States, 23 Supreme Court Reporter, 673.

Where parties settled on land and the land office, believing that said land was segregated, refused to allow the filing or to do any act that would institute their record title; held that the location gave the rights which attach to the land and that the patents issued to the railroad company be cancelled, that the settlemest gave the equity. United States vs. M. K. & T. R. R. 12 Supreme Court Reporter Page 13.

The Land Department cannot overthrow the law of Congress. Buffington vs. Chicago & St. Paul R. R. Co. 16 Supreme Court Reporter, 1018.

The above authorities are not in conflict with the first decision cited. The decisions are all in harmony. The trouble is with the appellees., in construing the affidavits and entries made by John Gayman, to be an entry of the land in controversy. The law declares that a person who enters Oklahoma country in violation of law shall not be permitted to make entry or acquire any rights thereto. As we believe the acts of Congress of March 1, and 2nd, 1889, and the proclamation of the President, constituted the law with reference to entering lands in Oklahoma, we come to the conclusion that John Gayman never had an entry on the land in controversy. I could swear that I was President of the United States, and sign a patent to the public land, but it would be absurd to call the instrument a patent to public land, although it might be regular on its face. This doctrine of "Regular on its face," has made a deep and lasting impression on the appellees. A great many documents may be regular on their face, and be nothing, and convey no rights. A thief might make a deed conveying stolen propery, regular on its face, a lunatic might make a conveyance regular on its face. At the time John Gayman filed his relinquisment to the government, April 12, 1893 (Transcript 17) James L. Hodges was a settler on the land and had made permanent improvements and when Gayman filed said relinquishment the right of James L. Hodges attached at once. (Admiting for argument that John Gayman's filing was voidable) unless the relinquishment of Gayman was induced by the contest of William R. Colcord.

The relinquishment of Gayman was not induced by the

contest of Colcord (Transcript 17.) It would be as reasonable to say that Gayman's relinquishment was induced by the settlement of Hodges, and also by Hodges contest filed August 23, 1889. (Transcript 4.)

At the time William R. Colcord filed his contest July 23; 1889. James L. Hodges was a settler on the the land (Transcript 3) William R. Colcord had notice of the rights, of James L. Hodges at the time he filed his contest, because James L. Hodges was in possession of the land.

All of which is respectfully submitted in the court.

J. S. Jinkins
Attorney Appellant.

Solicitor for Appellants.

Over.

In the Supreme Court of the United States.

Ella M. Parker, Gertrude W. Hodges, William E. Hodges, heirs at law of James L. Hodges,
Appellants,
vs.
William C. Colcord, Henry S. Colcord, Charles F. Colcord and Mary L. Griffith,
Appellees.

Come now the appellants, and by leave of the Court, files this a correction of their brief on file, and also an additional list of authorities:

The first line of page 2 of the brief should be July the 23rd, 1889, instead of August 23rd, 1889.

The last line of page 10 of the brief should be the first line of page 12 of appellants' brief.

Appellants desire to submit the following list of authorities for the consideration of the Court, the same being the authorities relied on by the Supreme Court of the Territory of Oklahoma to sustain the theory that the filing of a party who entered the Oklahoma country in violation of law, segregated the land from the public domain, and initiated a right to the land, and gave it the character of private property:

Chotard vs. Pope, 12 Wheat. 586. Wilcox vs. Jackson, 13 Pet. 498. Carroll vs. Safford, 3 How. 441. Witherspoon vs. Duncan, 4 Wall. 210. Railroad Co. vs. Dunmyre, 5 Supreme Ct. Reporter 112. Sturr vs. Beck, 10 Supreme Ct. Reporter 350. Land Co. vs. Griffey, 12 Supreme Ct. Reporter 362. Whitney vs. Taylor, 158 U. S. 85.

Respectfully submitted.

J. S. JENKINS,
Attorney for Appellants.

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JAMES H. MCKENNEY
Clerk.

Supreme Court of The United States.

OCTOBER TERM, 1906.

DAVID L. HODGEN, ELLA M. PARKER, GEORGIANA M. HODGEN AND WILLIE E. HODGEN, HEIRS-AT-LAW OF JAMES L. HODGEN, Appellants.

VS.

WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD AND MARY L. GRIFFITH, Appellees.

No. 135

Appeal from the Supreme Court of the Territory of Oklahoma.

BRIEF FOR APPELLEES.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
For Appellees.

14563

Supreme Court of The United States.

OCTOBER TERM, 1903.

DAVID J. HODGES, ELLA M. PARKER, GERTRUDE M. HODGES AND WILLIE E. HODGES, HEIRS-AT-LAW OF JAMES L. HODGES, Appellants.

VS.

WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD AND MARY L. GRIFFITH, Appellees.

No. 155

Appeal from the Supreme Court of the Territory of Oklahoma.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

While the statement of facts made by counsel for appellants (Brief pp. 1 & 2) is, in the main, correct, we desire to call attention to an error con-

tained therein and to a few additional facts shown by the record. In the brief for appellants said counsel makes the following statement; "William R. Colcord, the father of the appellees, filed a contest against the entry of John Gayman August the 23rd, 1889;" whereas, in fact, this contest was filed on July 23d, 1889 (R. pp. 4 & 11). The record also shows that Colcord was not only the prior contestant for the tract of land involved herein, but that a trial was had before the local land office at Oklahoma City between him and Gaymon (the entryman) upon the allegations contained in the former's affidavit of contest and that the decision of the local officers was in favor of Gaymon and Colcord appealed to the Commissioner of the Gen'l. Land Office where the decision of the local officers was affirmed and Colcord thereupon appealed to the Secretary of the Interior, where said cause was pending at the time this court rendered its decision in the case of Smith vs. Townsend, 149 U. S. 490 (R. pp. 6-10-11); that after Colcord had entered said tract as a homestead, Hodges contested said entry claiming to be a prior settler on said tract and charging that Colcord was disqualified to make entry of any land in Oklahoma; that said contest was tried before the local officers and carried by successive appeals to the Secretary of the Interior who decided the issues of law and fact involved therein in favor of Colcord and, consequently, dismissed Hodges' contest finding, among other things, that Gaymon's relinquish-

ment was the result of Colcord's contest (R. pp. 5-10); that, after the issuance of patent to Colcord, Hodges commenced this action in the District Court of Oklahoma County wherein a general demurrer to plaintiff's petition was filed and sustained and the cause dismissed. (R. pp. 3, 12 & 13.)

ARGUMENT.

Counsel for appellants urge but one proposition as a ground for reversing the judgment of the lower court, which may be fairly and concisely stated as follows: That, he being disqualified (under the Act of Congress of March 2nd, 1889) to enter or acquire title to any land in Oklahoma, Gaymon's homestead entry covering the tract involved was void *ab initio* and, consequently, did not segregate the tract from settlement by a qualified homestead entryman; hence, Hodges settlement made on July 22nd, 1889, being one day prior to the filing of Colcord's contest against Gaymon's entry, was the first legal appropriation of said tract for homestead purposes. Thus it is seen, that this entire controversy is hinged upon the question of whether or not Gaymon's said nomestead entry was a mere nullity for all purposes or was only voidable and subject to be set aside upon a proper application and showing in support thereof. It is not contended that said entry was irregular upon its face, but that it was procured by fraud and perjury on the part of the entryman. This contention of counsel for appel-

lants is based principally upon the following declaration in Calhoun vs. Violet, 173 U. S. 60, to-wit: "The fact that the plaintiff had entered the territory prior to the time fixed by the statute and the proclamation of the President having been conclusively determined, it follows inevitably, as a legal result, that an entry of land made under such circumstances was void, and that the ruling by the Land Department so holding was correct." We confidently claim that the rule so laid down by this court does not support the contention of counsel, as it is only after the fact of the entryman's disqualification has "been conclusively determined" that this court says "it follows inevitably, as a legal result, that an entry of land made" by such entryman is void. It would seem that no extended argument is necessary to show the clear and important distinction between the rule thus announced by this court and the contention of counsel, who claims that such an entry is void without any preliminary showing or determination whatever.

We can hardly conceive of the practicability of a rule of law declaring a homestead entry (valid upon its face) absolutely void because of false swearing or other fraud committed by the entryman in its procurement. How, when and by what tribunal could such an entry be considered void *ab initio*, without the fact or facts rendering it invalid having been first established? The rule applicable to the question under consideration is

correctly stated by the Hon. Secretary of the Interior in McMichael vs. Murphy, 20 L. D. 147, as follows: "Although White had entered the Oklahoma Country during the prohibited period, yet his homestead entry was *prima facie* valid. Its invalidity had to be established by extraneous evidence, and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done, the tract covered by said entry would have remainedforever segregated from the public domain; so far, at least, as the unquestioned legality of the entry itself could accomplish that fact. Hence it cannot be regarded as void, but voidable only. True White lacked one of the essential qualifications of an entryman for Oklahoma lands. But it has been held that the entry of an alien (who also lacks the very essential qualifications of citizenship) is not void but voidable." See also McMichael vs. Murphy, 70 Pac.1 89, wherein the Supreme Court of Oklahoma approve the conclusion reached by the Secretary on this question and cite numerous decisions of this court in support thereof.

Furthermore, it should be remembered that this court was not attempting to state the distinction between a void and a voidable entry in Calhoun vs. Violet, *Supra* and, consequently, may not have guarded the language used with that degree of care which would have been exercised had the case in hand required that such a distinction be drawn. As a general rule no instrument or proceeding can be said to be absolutely void

unless its invalidity is apparent upon its face or upon the face of the record showing such proceeding. As is well stated by Mr. Black, in his work on judgments, under the the title of "Voidable and Void Judgments" (Sec. 170), "the differences, though real and fundamental, are not always marked with sufficient sharpness in juristic writing, and courts have been known to speak of a judgment as void when they meant no more than that it was liable to be over-turned if properly attacked." It is also stated in the same section of said work that, "Now a void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. ***On the other hand, a voidable judgment is one which, though not a mere nullity, is liable to be made void when a person who has a right to proceed in the matter takes the proper steps to have its invalidity declared.*** It may be here stated, however, that it is very doubtful whether a judgment can ever be considered entirety void except in the single case where there was a total want of jurisdiction to render it. And even then, in the case of a domestic judgment, it is a serious question whether the lack of jurisdiction must not appear on the face of the record in order to entitle the courts to treat it as a nullity." It is also declared in Sec. 218 of the same work that, "the result deducible from a majority of the cases

seems to be that it is only when the judgment appears upon its fact to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes." While this rule has, probably, been more often declared in text books and decision relating to judgments than in those upon any other subject, it is equally applicable to other proceedings conferring or attempting to confer legal rights.

It being conceded that Gaymon's homestead entry was valid upon its face, it, therefore, required the filing of a proper contest affidavit, supported by sufficient evidence, to procure the cancellation of said entry, and no reason can be assigned or imagined why the first party to file such contest affidavit and diligently prosecute same should not, upon the cancellation of said entry, be entitled to the preference right of entry prescribed by statute and the rules of the Interior Department. The mere settlement of Hodges could never have established the disqualification of Gaymon as a homestead entryman and, consequently, could never have resulted in the cancellation of his entry. The Secretary of the Interior having found from the evidence that Gaymon relinquished his homestead entry because of the filing and prosecution of Colcord's contest challenging the validity of same, this finding of facts will not, in the absence of fraud be re-examined or questioned by the courts. Calhoun vs. Violet *Supra*.

Counsel for appellants cites the case of Moffat vs. United States, 112 U. S. 24, as supporting his contention but, in doing so, he again fails to make the proper distinction between a conveyance that is wholly void and one that is merely voidable, i. e. subject to be set aside upon the facts rendering it invalid being established in a direct proceeding for that purpose. In the case last cited it is specifically held that, "In a suit by the United States directly assailing a patent and seeking its cancellation for fraud in the conduct of their officers, the burden of proof is upon the United States to show a fatal irregularity or corrupt conduct on their part." On the contrary, according to the contention of counsel, there was no necessity of a suit to set aside the patent but a pualified entryman might have initiated a right to the land described therein by settlement in total disregard of the rights claimed under said patent. In our opinion, the other authorities cited by counsel in support of his said contention are equally inapplicable and we deem it unnecessary to further prolong our discussion of the question involved.

We, therefore, respectfully submit that there is no merit whatever in the contention of counsel for appellants and that the judgment of the lower court should be affirmed.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
For Appellees.

Supreme Court of the United States.

No. 155.—October Term, 1903.

David J. Hodges, Ella M. Parker, Gertrude M. Hodges and Willie E. Hodges, Heirs-at-Law of James L. Hodges, Appellants,
vs.
William C. Colcord, Henry S. Colcord, Charles F. Colcord and Mary L. Griffith.

Appeal from the Supreme Court of the Territory of Oklahoma.

[March 7, 1904.]

Mr. Justice Brewer delivered the opinion of the Court.

On June 1, 1901, James L. Hodges filed his petition in the District Court of Oklahoma County, Oklahoma Territory, praying that the defendants, the heirs of William R. Colcord, deceased, the holders of the legal title by patent from the United States to a tract of land in the county, be decreed to hold that title in trust for him. In it he alleged that on July 22, 1889, he was legally qualified to make a homestead entry of the land; that on that day he settled upon it with intent to acquire title under the homestead laws of the United States, and immediately made permanent and lasting improvements as required by law. He further alleged "that at the time he entered upon said land, and made settlement thereon, one John Gayman had entered upon and occupied said land; that on the 25th day of April, 1889, the said John Gayman obtained a pretended homestead entry on said land; that said Gayman was disqualified from ever entering or obtaining any right or title to said land, by reason of his entering upon and occupying a portion of the Oklahoma country declared open to settlement by the President's proclamation of March 3, 1889, prior to 12 o'clock noon, April 22, 1889, as shown by a copy of the decision of the Land Department, recorded in vol. 24, page — of the United States Land Decisions, hereto attached, marked 'Exhibit A' and made a part of this petition.

"In the decision above referred to the honorable Secretary of the Interior finds as facts that James L. Hodges has resided on said land since July 22, 1889; that Runyan has resided on said land since May 13, 1890, and William R. Colcord since 1893.

"Said William R. Colcord filed his contest against the said John Gayman on the 23d day of July, 1889, on the ground of disqualification, and the plaintiff James L. Hodges filed his contest against said John Gayman August 23, 1889, on the ground of prior settlement, as shown by the decision of the Hon. Secretary of the Interior dated December 1, 1894, hereto attached marked 'Exhibit B,' and made a part hereof."

A demurrer to the petition was sustained by the District Court and the suit dismissed. The decision was affirmed by the Supreme Court of the Territory, (70 Pac. Rep. 383,) whereupon an appeal was taken to this court. Pending the proceedings in the Territorial courts Hodges died, and the suit was revived in the names of his heirs.

The appellants' contention is that Gayman was legally disqualified to make a homestead entry of the land; that his entry was absolutely void; that Hodges was the first person legally qualified to make an entry who actually settled upon the land and that therefore upon Gayman's relinquishment he became entitled to entry and patent. On the other hand, the defendants' contention rests on sec. 2, chap. 89, (21 Stat. 141,) which provides:

"SEC. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

The exhibits attached to the petition show that the Land Department found that Gayman was within the territory at the time of the opening of the lands for settlement; that after the decision in *Smith* v. *Townsend*, (148 U. S. 490,) he filed a relinquishment in the local land office, and that such relinquishment was induced by the contest of Colcord. This finding, being one of fact, is conclusive upon the courts. Colcord was the contestant who procured the cancellation of Gayman's homestead entry. He comes within the terms of the statute. Was this statutory right of entry destroyed by Hodges' settlement, a settlement made intermediate Gayman's homestead entry and the initiation of this contest? We are of the opinion that it was not. Gayman's homestead entry was *prima facie* valid. There was nothing on the face of the record to show that he had entered the territory prior to the time fixed for the opening thereof for settlement, or that he had in any manner violated the statute or the proclamation of the President. This *prima facie* valid entry removed the land, temporarily at least, out of the public domain, and beyond the reach of other homestead entries. The first to contest was Colcord, and as a result of that contest Gayman relinquished his entry. To take from Colcord the benefit of the relinquishment which his contest had secured would be an injustice to him as well as a disregard of the act of 1880.

Some reliance is placed by the appellants on the language of this court in *Calhoun* v. *Violet*, (173 U. S. 60, 64,) in which we said, in respect to an entry similar to Gayman's, "that an entry of land made under such circumstances was void, and that the ruling by the Land Department so

holding was correct," but that language was used with reference to the claim of the entryman, and what was meant was that such entry was void as to him—that is, gave him no rights. So here the entry by Gayman was as to him void—gave him no rights. But that decision did not determine what effect an entry *prima facie* valid, yet made by one in fact disqualified to make the entry, had upon the status of the land or the rights of other parties. Generally, a homestead entry while it remains uncancelled withdraws the land from subsequent entry. Such has been the ruling of the Land Department. In *In re Cliff*, (3 L. D. 216, 218,) it was said by Secretary Teller:

"Under the present ruling of this department, entries of record *prima facie* valid appropriate the lands covered thereby, and, while they remain uncancelled, the land is not subject to further entry. (*Graham* v. *H. & D. R. R. Co.*, 1 L. D. 380; *Whitney* v. *Maxwell*, 2 L. D. 98; *McAvinney* v. *McNamara*, 10 C. L. O. 274; *Davis* v. *Crans et al.*, 11 C. L. O. 20.)"

The same proposition was affirmed in *In re Laird*, (13 L. D. 502, 503.) In *McMichael* v. *Murphy*, (20 L. D. 147, 150,) the question arose as to an entry in Oklahoma, and Secretary Smith discussed it in these words:

"Although White had entered the Oklahoma country during the prohibitory period, yet his homestead entry was *prima facie* valid. Its invalidity had to be established by extraneous evidence, and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done, the tract covered by said entry would have remained forever segregated from the public domain; so far, at least, as the unquestioned legality of the entry itself could accomplish that fact. Hence it cannot be regarded as void, but voidable only. True, White lacked one of the essential qualifications of an entryman for Oklahoma lands. But it has been held that the entry of an alien (who also lacks the very essential qualifications of citizenship) is not void but voidable. (*Leary* v. *Manuel*, 12 L. D. 345; *Hollants* v. *Sullivan*, 5 L. D. 115; *Pfaff* v. *Williams et al.*, 4 L. D. 455; *St. Paul, Minneapolis & Manitoba R. R. Co.* v. *Forsyth*, 3 L. D. 446.) Being voidable only, White's entry segregated the land so long as it remained of record."

In *Jones* v. *Arthur*, (28 L. D. 235,) it was decided that "land in the actual possession and occupancy of one holding the same under claim and color of title is not subject to homestead entry." See also *Butler* v. *California*, (29 L. D. 610.) In *Witherspoon* v. *Duncan*, (4 Wall. 210,) it was held that "lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained;" and in *Hastings &c. R. R. Co.* v. *Whitney*, (132 U. S. 357,) it was said by Mr. Justice Lamar (p. 361):

"In the light of these decisions the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale or grant until the

original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

And again, on page 364, after noticing some defects in the form of the entry—

"But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

But it is unnecessary to multiply quotations. The entry of Gayman, though ineffectual to vest any rights in him, and therefore void as to him, was such an entry as prevented the acquisition of homestead rights by another until it had been set aside. It was relinquished and removed from the records of the land office as the result of a contest by Colcord. He was entitled under the statute to the benefit of that contest, and was rightfully given an entry of and patent to the land.

The judgment of the Supreme Court of Oklahoma is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.